

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DOLLAND MOODY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,249
<b>PIPING DESIGN SERVICES</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 30, 2000. The Appeals Board heard oral argument on September 13, 2000.

**APPEARANCES**

Gary A. Winfrey of Wichita, Kansas, appeared on behalf of claimant. Gregory D. Worth of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The two issues on appeal are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to temporary total disability after February 9, 1998?

The Administrative Law Judge awarded benefits for a 60.9 percent work disability based on a 63 percent wage loss and a 58.8 percent task loss. The ALJ also awarded temporary total disability benefits through March 19, 1998.

On appeal, respondent contends claimant should be limited to disability based on functional impairment. Respondent cites two reasons for doing so. First, respondent contends claimant has no wage loss resulting from this injury. At the time of the injury, claimant was working as a temporary employee. The job he was doing for respondent, working as a machinist and toolmaker, ended while claimant was undergoing treatment for this injury. After claimant left work for respondent, claimant found employment that, according to respondent, was essentially the same type of work he was doing for respondent at the time of the injury. Although claimant was not earning a comparable wage, respondent argues there was no causal connection between the injury and wage loss.

Second, respondent argues claimant has, since the injury, rejected respondent's offer of appropriate employment, employment that would have paid a comparable wage, and is, for that additional reason, entitled only to functional impairment.

In the event the Board finds claimant is entitled to work disability, respondent argues the ALJ erred by ignoring the task list prepared by respondent's expert. According to respondent, there was not a proper foundation for the task list the ALJ relied upon for the award.

Finally, respondent challenges the period of temporary total disability awarded. Respondent contends claimant was released by the treating physician on February 9, 1998, and, although he received treatment after that date, is not shown by the evidence to be totally disabled after that date. As above indicated, the ALJ awarded temporary total disability benefits through March 19, 1998.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the evidence, the Appeals Board agrees with the general conclusions by the ALJ but has modified the Award based on the Board's understanding that Dr. Estivo's task loss opinion is 53 percent, not 58.8 percent, and to correct what appears to have been a mathematical error in the calculation of benefits.

#### **Findings of Fact**

1. Claimant began working for respondent in late June or early July 1997 as a toolmaker/machinist.
2. Claimant was injured at work on August 15, 1997. As he was tilting the head on a milling machine, a large metal piece weighing approximately 300 pounds, the gear inside broke and the weight came down on claimant's left arm. The accident injured claimant's back.
3. Claimant received treatment first with Dr. Steve Couch and then Dr. John P. Estivo. Dr. Estivo first examined claimant September 2, 1997, and continued to treat claimant

through March 19, 1998. Based on MRI results, Dr. Estivo initially determined claimant had a herniated disc at L5-S1. But Dr. Estivo recommended conservative treatment. He gave restrictions, gave epidural shots, and sent claimant for approximately 12 weeks of physical therapy.

In February 1998, Dr. Estivo sent claimant for a functional capacity examination. The report from the examination, dated February 2, 1998, identified limits to claimant's lifting and other activity. Dr. Estivo saw claimant next on February 9, 1998. At that time, claimant complained of lumbar spine pain but no radicular symptoms. Dr. Estivo diagnosed lumbar spine strain, a change from the previous diagnosis of a herniated disc, and recommended claimant be released with the FCE results acting as the permanent restrictions. Dr. Estivo rated claimant's permanent impairment as 3 percent of the whole person. Dr. Estivo testified the rating was based on the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*.

Although Dr. Estivo released claimant February 9, 1998, he saw claimant again on March 5 and March 19, 1998. On March 5, 1998, he saw claimant for "increased lumbar spine pain." At that time, he also diagnosed a hip bursitis. Dr. Estivo recommended and gave an injection of Depo Medrol into claimant's hip. He also returned claimant to a 20-pound weight limit temporarily to allow the hip bursitis to resolve.

Dr. Estivo saw claimant March 19, 1998, with continuing lumbar pain. Claimant was no longer having the hip bursitis. Dr. Estivo recommended claimant be released with the restrictions set forth in the FCE. Dr. Estivo's notes describe the restrictions as follows:

He is currently able to work in the medium to heavy physical demand level for an 8 hour day. He can occasionally lift 75 lbs. He can frequently lift 35 lbs. and constantly lift 15 lbs.

Dr. Estivo testified regarding two task lists. The first was one prepared by Ms. Karen C. Terrill. Dr. Estivo testified claimant would not be able to perform tasks involving lifting more than 75 pounds. He appears to have adjusted this to lifting not more than 70 pounds. In either event, three of the total 17 non-duplicative tasks involved lifting as much as 150 pounds, and Dr. Estivo agreed claimant would not be able to perform those tasks for what calculates to be an 18 percent loss.

Dr. Estivo also reviewed a list of tasks identified as Claimant's Exhibit 6. From this list of 17 tasks, Dr. Estivo agreed claimant cannot do 9 or 53 percent.

The ALJ states that Dr. Estivo changed his task loss opinion from 53 percent to 58.8 percent, the same as Dr. Murati. The Board construes Dr. Estivo's testimony differently. In his deposition testimony, Dr. Estivo identifies 9 of 17, or 53 percent, of the tasks as ones claimant cannot do. The exhibit behind Tab No. 6 to Dr. Estivo's deposition (labeled Claimant's Exhibit 6) reflects that claimant cannot do 10 of the 17 tasks. But it appears this

exhibit is a copy of what was used for Dr. Murati's deposition and reflects a "Y" for yes and "N" for no as marked by Dr. Murati, not Dr. Estivo. This exhibit then shows a 58.8 percent task loss. We can only assume this is what led the ALJ to conclude Dr. Estivo had changed his opinion. But, as indicated, we understand the exhibit to be Dr. Murati's opinion, not Dr. Estivo's. Dr. Estivo, on the other hand, testifies as to his opinion about the tasks. In his testimony he identifies 9 of 17, or 53 percent, of the tasks as ones claimant cannot do. We find nothing else in the record that would indicate Dr. Estivo has changed his opinion after his testimony that the loss was 53 percent.

4. Claimant's Exhibit 4 is a list of tasks claimant identified as tasks he performed at work in the 15 years before this accident. Claimant's Exhibit 6 is a modified version of the same list. The modifications were based on claimant's testimony about the tasks.

5. At the time claimant began working for respondent, he signed an agreement acknowledging that the employment was temporary. Claimant understood the work was to last approximately six months with possible extensions. At the time of the accident, claimant was working on a project at Raytheon. Claimant understood his work for respondent was to end once the job at Raytheon was complete. At the time he was released by Dr. Estivo, the job at Raytheon had been completed.

6. Dr. Pedro A. Murati saw claimant on May 18, 1998, at the request of claimant's counsel. Dr. Murati diagnosed lumbosacral strain with left L5 radiculopathy. He rated the impairment as 10 percent of the whole person based on DRE Category III from the 4<sup>th</sup> Edition of the *AMA Guides*. Dr. Murati relied on the restrictions from the FCE done at Dr. Estivo's direction. At his first deposition, taken January 20, 1999, Dr. Murati applied those restrictions to claimant's Exhibit 4 and concluded claimant could not do 8 of the 16 tasks for a 50 percent loss. At his second deposition, Dr. Murati applied the restrictions to the modified list, now identified as Claimant's Exhibit 6, and concluded claimant could not do 10 of 17 or 58.8 percent.

7. After claimant was released by Dr. Estivo, respondent offered claimant a job in Arkansas at \$18 per hour. Claimant was not told whether this would or would not involve overtime. Claimant did not accept the job because he did not want to leave Wichita. Claimant asked if there was anything local but there was not at that time.

8. Claimant did not return to work for respondent but did find other work in March 1998. His first employment was at KMG Machine & Tool at \$15 per hour. Claimant left that job July 17, 1998. Claimant advised KMG of his restrictions and KMG did what it could to accommodate those restrictions. The work caused pain in claimant's lower back as well as his hip and foot.

Claimant next tried self-employment as a contractor but was unable to make money at this. On August 10, 1998, he began working at Albertson & Hine as a toolmaker earning \$14.50 per hour. Claimant found this work to be too heavy. It aggravated his injury and

claimant left the work to let his back pain resolve. Claimant then worked part time, 20 hours per week, at Sunnyside Machine. He next worked at Precision Profiling. At Precision Profiling, claimant worked as a machinist but worked with small parts and was working within the restrictions recommended by Dr. Murati. At Precision Profiling, claimant earned \$15 per hour for 40 hours per week or \$600 per week. After Precision Profiling, claimant worked at American Machine & Tool earning \$2,000 per month.

The work claimant did after the injury was similar, but not exactly the same, as the work he was doing at the time of the injury. The work claimant did after the injury included some of the tasks the physicians, Dr. Murati and Dr. Estivo, testified would exceed claimant's restrictions and performing the work aggravated claimant's symptoms.

### Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).
2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.
4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The Board concludes claimant's decision not to accept employment offered in Arkansas does not represent bad faith on claimant's part. The Board may consider factors other than the physical requirements of the job when deciding whether rejection of offered employment is bad faith. *Parsons v. Seaboard Farms, Inc.*, No. 83,948, 27 Kan. App.2d \_\_\_\_ (July 28, 2000). Although claimant had worked in several other states, rejection of an offer in Arkansas does not represent bad faith where, as here, the evidence otherwise indicates claimant is attempting to find appropriate employment. In this case, claimant repeatedly sought and obtained other employment after his injury.

6. The Board concludes Claimant's Exhibit 6 does, as the ALJ found, most accurately describe the tasks claimant performed in the 15 years before this injury. The list is most consistent with claimant's testimony. The Board also concludes there was adequate foundation for Claimant's Exhibit 6. As above indicated, claimant first testified that Claimant's Exhibit 4 accurately described the tasks. He then testified to certain modifications to the tasks. Exhibit 6 incorporates the changes claimant made in his testimony. The Board also considers Exhibit 6 to be more accurate than the list prepared by Ms. Terrill because claimant identified numerous instances where that list does not appropriately reflect the task, principally in the amount of weight involved.

7. Respondent has argued in this case that claimant is not entitled to work disability because his wage loss was not caused by the injury. According to respondent, claimant left his job for respondent because it was temporary, not because of the injury.

The Board generally agrees with the legal theory respondent advances. Causal connection is made where the claimant must leave the job because of the injury, notwithstanding other economic factors that may influence subsequent wages. But the Board does not agree with the factual premise respondent relies on in this case. The Board concludes claimant's injury and the resulting restrictions made claimant unable to do the job he was doing at the time of the injury. This conclusion is based, in part, on the fact that both Dr. Estivo and Dr. Murati concluded claimant's restrictions would prevent him from doing some of the tasks claimant did in the work for respondent as those tasks are reflected in Claimant's Exhibit 6. This conclusion is also based, in part, on the fact that claimant had difficulty doing similar tasks in the work he did after the injury. Although claimant performed some tasks after the injury that the physicians had concluded he should not do, claimant did not generally do them for an extended period and to some extent they caused symptoms. The Board is not persuaded by the record in this case that the restrictions were inappropriate. Both physicians used the same restrictions based on the functional capacity evaluation.

8. Claimant has a 63 percent wage loss. This conclusion compares claimant's stipulated preinjury wage of \$1,235 per week with the \$461.54 per week claimant was making in his last employment. Claimant earned different wages in other employment after the injury and during the time earning a different wage would have had a different wage loss and, as a result, a different work disability. However, based on the method the Board uses to calculate

benefits when there has been a change in the disability, the earlier percentage of disability would not affect the amount of the benefits. *Bohanan v. U.S.D.* No. 260, 24 Kan. App.2d 362, 947 P.2d 440 (1997); *Deist v. Dillon Companies*, WCAB Docket No. 213,485 (December 1999). The Board has, therefore, used only the last disability to calculate benefits below.

9. Claimant has a 56 percent task loss. This conclusion gives equal weight to the opinions of Dr. Murati and Dr. Estivo based on the task list defined as Exhibit 6.

10. Claimant has a 59.5 percent work disability. K.S.A. 44-510e.

11. The Board agrees with and affirms the finding that claimant was temporarily and totally disabled through March 19, 1998, the date of Dr. Estivo's final release. Dr. Estivo had earlier released claimant but claimant came back with increased symptoms. Dr. Estivo's statement that he was re-releasing claimant on March 19, 1998, implies that the earlier release, February 9, 1998, had been rescinded.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on March 30, 2000, should be, and the same is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Dolland Moody, and against the respondent, Piping Design Services, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred August 15, 1997, and based upon an average weekly wage of \$1,235, for 30.86 weeks of temporary total disability compensation at the rate of \$351 per week or \$10,831.86, followed by 237.49 weeks at the rate of \$351 per week, or \$83,358.99, for a 59.5% permanent partial general disability, making a total award of \$94,190.85.<sup>1</sup>

As of November 20, 2000, there is due and owing claimant 30.86 weeks of temporary total disability compensation at the rate of \$351 per week or \$10,831.86, followed by 139.57 weeks of permanent partial disability compensation at the rate of \$351 per week in the sum of \$48,989.07, for a total of \$59,820.93, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$34,369.92 is to be paid for 97.92 weeks at the rate of \$351 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

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<sup>1</sup> Although the Board has found a slightly smaller percentage of disability than was found by the ALJ, the total benefits awarded by the Board are higher because of an apparent error in the ALJ's calculation of the number of weeks of permanent partial disability.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary A. Winfrey, Wichita, KS  
Gregory D. Worth, Lenexa, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director